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October 18, 1995

HAND DELIVERED

Deborah D. Johnson, Esq.
Wisconsin Department of Natural Resources
101 S. Webster Street
LC/5
Madison, WI 53702

Re: Kreher Park Site, Ashland, Wisconsin -- City of Ashland Liability Issues

Dear Ms. Johnson:

The purpose of this correspondence is to share with the Wisconsin Department of Natural Resources ("WDNR") the information we have discovered concerning certain activities of the City of Ashland ("the City") at the Kreher Park/former John Schroeder Lumber Company property in Ashland, Wisconsin ("the Site"). We believe the City's conduct at this Site prevents the City from claiming an exemption from liability, pursuant to § 144.76(9)(e)(1m), Stats. Based on the information contained herein, WDNR should issue to the City a Responsible Party letter regarding the Site, pursuant to the authority of § 144.76, Stats. Moreover, without regard to responsibility under Wisconsin's Spill Statute, WDNR should investigate the City's disposal activities as described in this material under the Wisconsin Environmental Repair Program.

I. Spill Law Liability Exemption.

When the Wisconsin Legislature enacted sweeping changes to Wisconsin's Hazardous Substance Spill Law by the passage of the "Land Recycling Act" in 1994, the Legislature advanced several legislative purposes.[1] Among these legislative purposes was an intent to provide "innocent" municipalities which acquire contaminated property via tax delinquency proceedings an exemption from the obligation to remediate contamination that (1) exists on the property at the time of tax delinquency transfer, and (2) is caused by the activities of the tax-delinquent owner and/or prior owners. This exemption was created in part to provide an incentive for municipalities[2] to acquire such so-called tax delinquent "brownfields" to spur redevelopment of blighted urban areas in the hope of halting both urban sprawl and the siting of manufacturing sites on suburban cornfields.

However, the Legislature did not provide a "blanket" liability exemption. The exemption is conditioned upon 1) the appropriate status of the municipality, and 2) upon the appropriate lack of culpability for contaminated conditions. Although a municipality may be able to establish a *prima facie* qualification for the liability exemption[3] based on how it took ownership of the

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[1] Wisconsin's Land Recycling Act enacted several substantive changes to the Wisconsin Spill Law, § 144.76, Stats. The new law provides several liability exemptions for traditionally "innocent" parties or "non-polluters." The law created not only an exemption for municipalities which acquired contaminated property via tax delinquency proceedings, but also enacted, *inter alia*, a "purchaser liability exemption" program, protections for lenders who secure contaminated property while engaging in "lending activities", and protections for fiduciaries or trustees who are forced to manage contaminated properties in their role as fiduciaries or trustees.

[2] A "Municipality" is defined in the statute to include any city, town, village, county, etc. Sec. 144.01(6), Stats.

[3] It is important to note that, as addressed elsewhere herein, although the exemption provides a liability "pass" for hazardous substance discharges, the exemption is inapplicable to potential liability under several other bodies of Wisconsin state law (such as the Environmental Repair Program § 144.442, Stats., the Abandoned Containers Program § 144.77, Stats., and the Hazardous Waste Management Act § 144.60, *et seq.*, Stats.) including all federal law, such as the Comprehensive Environmental Response,

property, the municipality cannot claim that apparent exemption from liability for a specific site if it engages or has engaged in conduct prohibited by the statute. Specifically, the statute provides that the exemption is inapplicable to a discharge of hazardous substances caused by any of the following:

1. An action taken by the municipality.

2. A failure of the municipality to take appropriate action to restrict access to the property in order to minimize costs or damages that may result from unauthorized persons entering the property.

3. A failure of the municipality to sample and analyze unidentified substances in containers stored aboveground on the property.

4. A failure of the municipality to remove and properly dispose of, or to place in a different container and properly store, any hazardous substance stored aboveground on the property in a container that is leaking or is likely to leak.

§ 144.76(9)(e)2, Stats.

For purposes of this correspondence, we have assumed that the City of Ashland acquired the Site from the County of Ashland which acquired the property from Schroeder Lumber via *bona fide* tax delinquency proceedings. This ownership "track" would appear to establish the City's *prima facie* qualification for the liability exemption set forth in § 144.76(9)(e)(1m), Stats. (effective May 1994). However, as this information details, by its own conduct the City loses any right to claim that exemption.

II. The City's Conduct.

Northern States Power Company ("NSP") and its representatives have conducted substantial investigation into the history of the Site. This investigation has revealed that the City and its residents took actions which caused or contributed to a release of hazardous substances at the Site. The actions, as recounted by witnesses and as supported by contemporaneous documentation, are described below. WDNR should conclude that the City does not

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Compensation and Liability Act ("CERCLA") and the Resource Conservation and Recovery Act ("RCRA").

qualify for the liability exemption provided in the Spill Statute, because the City

(1) illegally transported and disposed of coal tar at the Site as recently as 1986;

(2) disposed of other solid wastes at the Site from at least the 1940s through the 1970s, creating an unlicensed landfill;

(3) failed to restrict access to the Site, which resulted in dumping activities occurring at the Site from at least the 1940s through the 1970s;

(4) failed to respond to coal tar-related contaminants detected at the Site, from the 1950s onward, or to take other steps to minimize the harmful effects of the contaminants on the environment in violation of state law; and

(5) conveyed contaminants across the Site via an open sewer as late as the 1950s.

All of this action (and inaction) by the City of Ashland has led to discharges of hazardous substances at the Site for which the City can cite no exemption from responsibility. To compound matters, the City has now closed the door on NSP's search for information about what occurred at the Site, by denying access to knowledgeable City employees. See Exhibit 1.

A. The City of Ashland Disposed of Coal Tar At the Site.

1. The City Trucked Coal Tar to the Site and Dumped it in the Area of the Current "Seep".

NSP has interviewed and secured the affidavit of Mr. Pete Carrington. See Exhibit 2. Mr. Carrington vividly recalled an incident when City personnel transported coal tar contaminants to the Site and disposed of them there.

Mr. Carrington was formerly a survey technician with Wilhelm Engineering ("Wilhelm"). He worked for Wilhelm on the City of Ashland's project of extending Ellis Avenue to the north toward the waterfront in 1986. During the excavation for that roadway extension, a large area of coal tar or coal tar-related contaminants was discovered. This coal tar was encountered just north of the railroad tracks in the path of

the proposed roadway. Mr. Carrington has marked this coal tar location on the map attached to his affidavit.

Mr. Carrington said the Wilhelm crew suspended activities upon encountering the contamination and contacted the City. A few hours later City dump trucks arrived; the excavation material (which included coal tar and coal tar-contaminated soils) was placed in the City dump trucks. The material was hauled by City personnel in City dump trucks south on Ellis Avenue, east to Prentice Avenue and then north to the grassy area in front of the former wastewater treatment plant ("WWTP") building. The material was then dumped in the location marked on the map by Mr. Carrington. This location is very near the area where other witnesses recall a coal tar or creosote pit on the former Schroeder operation, and is also very near to the location of the current "seep" area, which WDNR required NSP to fence.

This was no small amount of coal tar hauled and disposed of by the City. Mr. Carrington said he entered the excavation area at one point and was "knee-deep" in coal tar. Mr. Carrington said the City trucks steadily hauled and disposed of this coal tar for parts of two working days.[4] In order for the coal tar discovered in the Ellis Avenue area to have migrated from the ravine, it would have had to migrate uphill. Thus, it does not appear that the Ellis Avenue coal tar is associated with the coal tar located at the ravine area. See Exhibit 3.

2. The City Failed to Report This Incident to WDNR and Failed to Appropriately Characterize the Waste.

We have reviewed a copy of the WDNR Spill Report List from 1979 to current for Ashland County. Exhibit 4. We do not find and have not been informed of any report by the City to WDNR regarding the Ellis Avenue incident and the release of contaminants to the environment, as required by § 144.76(2), Stats. Not only did the City fail to report the coal tar incident as required by law, it illegally disposed of coal tar or coal tar-related contaminants on the Site, a non-approved

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[4] Please note that the location where the coal tar was encountered by the City is located off-site, as the Site is defined in WDNR's March 2, 1995 Responsible Party letter to NSP. As such, the City did more than manipulate coal tar on-site; rather, it hauled coal tar in its trucks from an off-site location to the Site and dumped it.

facility, in the post-RCRA era. The City's actions have directly led to the release of the hazardous substance of concern to the Department in this matter; moreover, according to Mr. Carrington, the disposal occurred at or very near the location of the current fenced seep area.

B. City's Inaction Concerning Coal Tar Contamination.

1. The City Knew of a Coal Tar Pit on the Schroeder Property.

Distinct from the above action, the City has also known of the existence of a coal tar or creosote pit on the Kreher Park property since at least 1951. At that time, the City contracted with Greeley & Hansen Engineers to begin building the WWTP facility on the Schroeder property in the former sawmill location.[5] A drawing of the proposed WWTP, prepared by Greeley and Hansen, locates a coal tar pit just south of the former WWTP building. See Exhibit 7. Not coincidentally, this is the same general location where several witnesses have located the Schroeder coal tar pit. See Exhibit 8. Moreover, during construction of the WWTP foundations and subsequent excavations, contaminants described as "petroleum-type wastes" (see Affidavit of Fred Kovach at Exhibit 9), and "oily wastes product[s]" (see Affidavit of Gordon F. Parent at Exhibit 10) were encountered in the excavation of the slab-wood fill material.

2. The City Failed to Take the Action Required by the Spill Statute and Requested by WDNR in Response to the Coal Tar Contamination.

In 1989, pursuant to a lawsuit settlement reached between the City, the Department of Justice ("DOJ") and Wisconsin's Environmental Decade ("WED"),[6] the City hired Northern

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[5] As described in greater detail, *infra* at pp. 12 to 14, the City commissioned the WWTP work only after significant repeated threats and warnings from the Wisconsin Board of Health regarding open sewers running across the Site. See Exhibit 5. This open sewer was present as late as 1951. See Exhibit 6. See also Affidavit of Gordon F. Parent at Exhibit 10.

[6] The case of State of Wisconsin v. City of Ashland, Ashland County Circuit Court Case No. 88-CV-9332, was brought following complaints of wastewater and sewage by-pass or overflows from the former WWTP building, resulting in direct discharges to

Environmental Technologies, Inc. ("NET") to conduct an environmental assessment of the property for a proposed expansion of the WWTP located at the Site. NET discovered an abandoned creosote wood waste pit and reported their findings to WDNR on August 22, 1989. See 8/22/89 NET letter to WDNR at Exhibit 12; see also LeRoy Lee interview summary at Exhibit 13. In response, WDNR wrote in an August 21, 1991 letter:

> The Department wants to see a permanent solution to the wood waste fill area. This will most likely mean a site remediation. The City should contact an environmental consultant to look into what options are available for treatment or disposal of the wood waste. Groundwater impacts from the fill also need to be addressed.

See Exhibit 14.

Despite (1) being aware of a coal tar pit area as early as 1951; (2) being reminded of the problem again in 1989; and (3) receiving WDNR's request to remediate the Site impacts in 1991, the City took no action to minimize the harmful effects of this contamination on the environment. The City ignored WDNR and ignored its statutory obligations pursuant to § 144.76(3), Stats. Through this repeated inaction, the City has allowed the environmental degradation at the Site to worsen over the intervening years.

The City did not merely ignore the 1989 NET report reminding it of coal tar and creosote contamination on its property, it devised plans to work through and around the contamination instead of addressing it as required by the Wisconsin Spill Statute and as requested by WDNR. For example, in its Facilities Plan Amendment dated April of 1991,

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Chequamegon Bay of between 11 to 54 million gallons annually from 1977 to 1986. See Exhibit 11. These by-passes were apparently caused by significant inflow/infiltration, which resulted in an exceedance of the WWTP's capacity. Such a capacity exceedance resulted in the discharge of raw or partially treated effluent, including sewage, and other wastewater, directly to Chequamegon Bay. The City entered into a Stipulated Judgment with WED and DOJ in 1988, which required it to inventory its sewer system to correct unnecessary infiltration to the system. In addition, the City was required to develop plans and specifications to alter the sewer system to address the capacity and by-pass problem.

the City's consultant proposed excavating coal tar and creosote-contaminated materials for trenching certain forcemains to the WWTP and then replacing the contaminated material in the trench at the time of construction. WDNR responded by notifying the City that if it excavated coal tar-contaminated material, it would be required to characterize the material and ultimately dispose of the material off-site as either a hazardous waste or in a solid waste landfill. See Exhibit 15. This increased the costs of the facility upgrade because the City would have to confront the coal tar contaminants rather than ignore the contamination, as had been its approach.

The potential costs involved with dealing appropriately with the coal tar contaminants had previously been identified to the City in its consultant's March 27, 1989 Facilities Plan Amendment. That document identified that one of the potential disadvantages of a facility upgrade at the existing site was that a "creosote pit on site makes expansion costs with cleanup even more costly." See Exhibit 16. Leroy Lee is an Ashland resident and former City of Ashland Water Utility Board member. Mr. Lee was a member of the Utility Board from 1985 to 1990. He stated in an interview with NSP representatives that when the creosote contamination was identified as a cost increase to the project, the City abandoned it plans to upgrade the existing facility and instead built a new WWTP at a new location. Rather than respond to the contamination and minimize the impacts on the environment, the City chose to abandon the site and the old WWTP facility to build a new facility at a different location. See Exhibit 13.

Had the City complied with WDNR's request and its regulatory obligation to investigate and remediate, appropriate steps would have been taken at that time to minimize further environmental degradation. The extent of the problem at the Site would have been investigated more than five years ago and appropriate remediation undertaken. This is important for two reasons. First, costs of cleanup have escalated through market factors and the implementation of NR 700, Wis. Admin. Code. Second, the City could not have argued for a liability exemption because the Land Recycling Act had not yet been enacted.

C. The City Used Kreher Park as a Landfill.

The City used the Site and Chequamegon Bay as a solid waste disposal area. The City not only actively disposed of a variety of wastes at the Site, but also permitted unrestricted dumping at the Site by its residents. These wastes generally included construction and demolition debris and municipal and industrial wastes. This solid waste landfill area was described as recently as 1974 by the City's Park and Recreation Board as a "disgrace to the City." See Exhibit 17. As discussed further below, contaminants associated with such landfilling activities have already been identified in the limited investigation of Kreher Park. Given the information obtained from witnesses regarding the historic filling activities at the Site, further environmental impacts associated with these activities will no doubt be uncovered at the Site and potentially in the Bay.

The following is a brief summary of interviews with witnesses who specifically recall City disposal activities on the Site. Copies of witness affidavits supporting these allegations are attached as Exhibit 18.

1. Gordon F. Parent. Mr. Parent is a 66-year old, life-long resident of Ashland. As a child he played in the area now called Kreher Park. Mr. Parent recalls that municipal waste was dumped along the west end of the Kreher Park site, both in Chequamegon Bay and along the shoreline of the Bay. He describes the waste as consisting of all types of demolition debris and municipal waste, including cans, bottles and all types of household waste. He specifically recalls an entire automobile, which he thinks may have been a 1936 Essex, disposed there. He wears a ring today which contains the remounted stone from a ring he found disposed at the Site.

Mr. Parent was employed at the City of Ashland WWTP for 34 years, from 1952-1986. He states that during his tenure with the City Treatment Plant, the City wanted to fill in the swampy area south of the WWTP, and accepted any kind of debris which was suitable to fill in those areas. This filling took place between the 1950s and the 1970s.

At some time in the 1950s while he was employed at the WWTP, Mr. Parent recalls that a line entering the Plant needed repair as a result of some construction. In

the course of repair, an area around the pipe was excavated. The excavation dug into an "oily waste product" in the ground. Mr. Parent said it was not at all unusual to find this sort of oily waste product on the site, and that it was common knowledge that a large area of the site was contaminated with this sort of material.

2. Joseph F. Kabasa, Jr. As a boy, Mr. Kabasa lived at 215 North Prentice Avenue, on the ridge of the bluff overlooking the Site. Mr. Kabasa not only recalled a large coal tar deposit south of the former WWTP building, he also recalled the City dumping its municipal waste directly into the Bay. Mr. Kabasa indicated, on the map which accompanies his affidavit, where the City disposed of municipal waste. This is the same basic location that Mr. Parent identified.

3. Ron Nye. Mr. Nye is a 53-year old lifelong resident of Ashland who attended elementary and junior high school at St. Agnes School. This school is located adjacent to the Site, atop the bluff. He recalls playing with friends at the Site during the late 1940s and 1950s. He had very specific recollections of landfill activities on the Site. For example, the children used to play "King of the Hill" on the piles of waste, which he recalls being routinely disposed of in an area just to the south of the former WWTP building. He remembers trucks disposing of a variety of products in this area such as stone, brick, masonry block, iron, cinders, demolition debris, and roofing materials. Periodically, when the mound of waste was leveled off, the kids used to play touch football in the area; however, he said they could not play tackle football because of the debris protruding from the area. As recently as 1970, Mr. Nye said he recalled the disposal of building waste at the Site following the demolition of St. Joseph's Hospital.

4. Ken Veno. Mr. Veno is a 53-year old Ashland resident and current NSP employee who also attended St. Agnes School. He too recalls playing, during the late 1940s and early 1950s, on the piles of waste disposed of at the Site. He recalls those waste piles being located on the west end of the Site in the area currently used to park boat trailers. He recalled a wide variety of demolition debris being disposed, including roofing materials and cinders. He said the waste piles were rat infested, which would indicate the presence of municipal

(organic) waste in addition to construction and demolition wastes. Mr. Veno also recalled the tar pit to the east of the dump area. He said he recalls his father telling him that the tar pit was used by the lumber company to dip lumber for treating.

5. John Walters. Mr. Walters is a former Consolidated Paper Company employee and local historian. He recalled in detail the presence of a coal tar or creosote pit on the Site during Schroeder Lumber's operation. Mr. Walters also recalled that the Site was used as a municipal dump. City residents were allowed to dispose household wastes in an area just southeast of the former Consolidated Paper dock.

6. Martin Eder. A Construction Inspector for Wilhelm Engineering, Mr. Eder worked on the Ashland Marina Project in 1986. Mr. Eder recalled that the area between the former WWTP building and railroad tracks had been used for many years as a dump by the City and local contractors. Trash, tin cans, and construction and demolition material from contractors were dumped there. We have not yet obtained an affidavit from Mr. Eder, but we have included an interview summary.

That the Site was used as a landfill should come as no surprise to WDNR. Attached at Exhibit 19 is an April 19, 1991 memorandum to the WDNR file prepared by Karen Vermillion, WDNR/Northwest District, regarding ERP scoring of the Site. Ms. Vermillion's scoring sheet refers to:

> . . . documented dumping of creosote treated wood, wood preservatives . . . Site is adjacent to the landfill site. The landfill site is slated for potential development as an addition to the WWTP. . . . Prior to 1920 site occupied by Schrader [sic] Saw Mill. It manufactured RR ties and timbers for docks - treated them with creosote and creosote pit located to south of site.

Ms. Vermillion reported that in addition to volatile organic compounds (VOCs) arsenic, chromium, copper and zinc were detected at elevated concentrations. These heavy metals are typically associated with both the landfilling activities described herein as well as municipal wastewater effluent. An open sewer traversed the Site as late as 1951. See Exhibit 6, 1951 Sanborn Map. Moreover, portions of a 1937 paper prepared

by a U.W. medical student titled "Sanitary Survey of Ashland" discuss the rampant filling activities. See Exhibit 20. For example:

> The refuse and ashes are largely disposed of in filling up ravines within the City limits. There are many depressions which need to be filled. The refuse and ashes are dumped in them and all inflammable material is burned. They try to keep all refuse, like tin cans and other non-inflammable material, in the bottom so that the ashes will form a covering over the top. Soil is then hauled over it. This has helped in improving the appearance of the City in many places. It does tend to form a breeding place for rats and mice, but this is kept down as much as possible by covering these places as promptly as the rubbish is dumped there.

This report of landfilling activities throughout the City supports many of the affiants' accounts of specific filling at the Site. Mr. Parent reports that landfilling activities continued at the site into the 1970s. See Exhibit 10. Disposal of solid wastes at this unlicensed facility in the 1970s violated WDNR's then-applicable regulations contained in § NR 51, Wis. Admin. Code. Indeed, the location of the Site as a landfill at that time violated both §§ NR 51.06 and NR 51.09, Wis. Admin. Code. See Exhibit 21.

D. The City Operated an Open Sewer Across the Site.

As noted above, an open sewer is shown running through the western part of the Site to Lake Superior on Sanborn Maps from 1901 until at least 1951. This sewer was an active conduit for contaminants onto the Site and beyond. Starting in the 1920s, the Wisconsin Board of Health (a WDNR predecessor agency) warned the City to stop dumping untreated raw sewage into the Bay. Finally in 1951, the State threatened to fine the City for every day the effluent continued to pollute the Bay. "Looking Backward, Moving Forward: Ashland, the Garland City of the Inland Seas", Jane Smith and Michael Goc, p. 26. The numerous warnings regarding this conduct are set forth in Exhibit 5; see also Exhibit 20, which contains the following pertinent information:

> Ashland sewage system is very inadequate. It is simply a means of collection and disposal

> into the bay with no method of treatment. (p. 54)
>
> Until 1936 several buildings along the lake front discharged their sewage directly on the banks along the bay, by private sewers. (p. 56)
>
> Those that live in some of the ravines are the most careless and dump their waste water a short distance from their homes. There is a section in the city health ordinance forbidding this practice but it is evidently not strictly enforced. (p. 72)

As the Affidavit of Gordon Parent set forth at Exhibit 10 states, from the 1930s into the early 1950s there was a sewage pipe which discharged into the swampy area of the Kreher Park site. He recalls that this pipe was one of the first sewer lines which was connected to the Wastewater Treatment Plant after it was built in 1951. It was connected to the Plant to eliminate the direct discharge of raw sewage and other untreated wastewater into the swampy area at the Site and the Bay.

In its 1991 Report to the U.S. Senate's Committee on Environment and Public Works titled Water Pollution -- Nonindustrial Wastewater Pollution Can Be Better Managed, the United States General Accounting Office states:

> . . . the Office of Technology Assessment estimates that household wastewater alone accounts for about 15 percent of the regulated toxic pollutants entering treatment plants. Furthermore, EPA estimates that as industrial discharges decrease, the proportion of both household and commercial pollutants sent to treatment plants will increase and will ultimately account for almost two-thirds of the toxic metals discharged to treatment plants . . . .
>
> Nonindustrial wastewater contains toxic and other harmful pollutants that are associated with health and environmental problems; the pollutants can also adversely affect treatment plant operations and worker safety. For example, heavy metals such as lead and mercury are associated with brain and kidney damage. GAO/RCED-92-40, pp. 3 and 8.

See Exhibit 22.

The report goes on to list some of the other toxic pollutants found in nonindustrial wastewater -- benzene, 1,2 Dichloroethane, selenium, antimony, pentachlorophenol, and toluene. GAO/RCED-92-40, p. 9.

The Board of Health was correct to require the City of Ashland to terminate its dumping of raw sewage onto the Site and into the Bay. Through its inaction for 30 years, the City assured that the toxic pollutants common to wastewater continued to flow across Kreher Park, into the swampy area Mr. Parent locates on the Site, and into the Bay.

III. Based on the City's Conduct, It Should be Named a Responsible Party by WDNR.

A. Coal Tar Disposal Resulted in a Release of Contaminants.

This correspondence presents WDNR with direct evidence, via a witness who saw City personnel load coal tar, encountered during the construction of Ellis Avenue to the north, in City-owned and operated dump trucks, haul the coal tar to the area south of the former WWTP building, and dump the coal tar at or near the current fenced seep area. See Carrington Affidavit at Exhibit 2. This is clear evidence that City employees manipulated coal tar materials (the primary contaminant of WDNR concern, thus far, at the Site) and ultimately disposed of coal tar on the Site at the location where WDNR has required NSP to establish access limitation pursuant to NR 714, Wis. Admin. Code.

When the City encountered the coal tar contamination during the extension of Ellis Avenue in 1986 and loaded it into its trucks, it "possessed or controlled" the hazardous substances. See State v. Mauthe, 123 Wis. 2d 288, N.W.2d 871 (1985). When it dumped that coal tar at the seep, it "caused" the discharge of hazardous substances. See § 144.76, Stats. When the City encountered the coal tar, it was obligated to do at least two things: (1) notify WDNR pursuant to § 144.76(2), Stats., and (2) properly characterize the waste, pursuant to RCRA and state law, before transporting it off-site for disposal. The City failed to do either. Rather, it ignored its statutory obligations and illegally disposed of coal tar, petroleum-impacted soil and coal tar-contaminated soil at a

non-approved facility.[7]

This evidence demonstrates that the City's action caused or contributed to releases of coal tar-related contaminants. Under normal circumstances, such evidence would certainly be sufficient for WDNR to issue a Responsible Party letter, beginning the enforcement process under § 144.76, Stats.; WDNR has issued such directives on evidence less certain than a sworn affidavit. Yet, because of the municipal liability exemption provision in the Land Recycling Act, WDNR has thus far been hesitant to issue such a letter to the City of Ashland.

The Land Recycling Act does not abandon the "polluter pays" principle which underpins basic environmental law. The type of City conduct we have substantiated in this letter is an overt "action taken by the municipality" which caused a hazardous substance discharge at the Site. Sec. 144.76(9)(e)2, Stats. This conduct is no different from that of a generator disposing of wastes at a landfill which subsequently contaminates groundwater. The City of Ashland engaged in disposal activities at the Site which caused or contributed to the release of hazardous substances. As such, WDNR should conclude that this conduct alone is sufficient to defeat any claim by the City of Ashland to a liability exemption with respect to this Site.

Moreover, the City's failure to act to minimize the harmful effects of the coal tar contamination at the Site, an act required by the Spill Statute, is tantamount to action resulting in further discharges. The City knew of coal tar contamination at its property as early as 1951, at the time of the WWTP construction, yet failed to take any action whatsoever to address what may have been continuing releases of hazardous substances for more than forty years.

The City failed to take the actions required of it by the Spill Law when contaminants were discovered again in 1989, by its consultant NET. The City ignored WDNR's 1991 request that it investigate groundwater and conduct site remediation. See Exhibit 14. These were actions the City was required to perform under state law, and its inaction should not now be

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[7] It is important to remember that the City's activities with respect to this coal tar occurred in 1986, not in the 1920s. By that time, the Spill Law and RCRA had been on the books for nearly a decade.

rewarded. Although the Land Recycling Act has been effective for more than a year, the Hazardous Substance Spill Law has been in effect for nearly 20 years. The City's inaction with respect to the discharge, and utter disregard for its statutory obligations under the Spill Law historically, can and should be viewed as action -- action which led to further discharges of hazardous substances to the overall detriment of the environment. Sec. 144.76(9)(e)(2)a, Stats.

B. City Filling Activities Resulted in Release of Contaminants.

Compelling first-hand evidence presented by witnesses confirms (1) that the Site was used by the City as a solid waste dumping ground (not to mention the Bay); and (2) that the City failed to restrict unlimited dumping at the Site by its residents. The landfilling activities conducted by the City and its residents not only constitute an "action taken by the municipality" (§ 144.76(9)(e)(2)a, Stats.), but also "a failure of the municipality to take appropriate action to restrict access to the property in order to minimize costs or damages that may result from unauthorized persons entering the property" (§ 144.76(9)(e)(2)b, Stats.).

Environmental investigations conducted in 1994 by Short, Elliott & Hendrickson ("SEH") at the Site, and as interpreted by Dames & Moore, indicate the presence of contaminant source areas likely related to such dumping activities and wholly unrelated to coal tar contamination associated with the ravine or coal tar pit at the Schroeder facility. Fuel oil compounds have been detected in TW-6. Additionally, compounds not detected in groundwater samples from ravine monitoring wells (TW-9), or compounds with concentrations higher than those in samples from the ravine wells, were also documented at TW-6. See Exhibit 23. As such, the ravine is not the apparent source of fuel oil impacts detected at TW-6. This data demonstrates there is a separate contaminant source area in the location of TW-6.

Moreover, high lead levels have been documented on the northwest portion of the Site -- correlating with the area where several of the individuals interviewed recall witnessing disposal activities. WDNR's scoring sheet completed by Ms. Vermillion references elevated levels of other heavy metals such as arsenic, chromium, copper and zinc. Heavy metals such as these are not associated with coal gasification plant byproducts, but are typically associated with waste disposal activities, municipal sewage, sludge or wastewater discharge.

See Exhibit 22. Releases of hazardous substances unrelated to coal tar contamination and typical of filling activities have been documented at the Site.[8] The City not only actively dumped wastes at the Site, but also allowed the unrestricted dumping of wastes by its residents.

The City's activity at the Site is not the type of conduct which the Legislature intended to protect. The disposal of coal tar and solid wastes at the Site are actions taken by the City of Ashland which should **not** be **rewarded** through the protection of a liability exemption. The actions were illegal at the time they were undertaken and impose obligations on the City today.

Under the weight of sound public policy, and by its own actions, the City loses any claim to an exemption from liability and should be required to investigate and remediate the discharges of hazardous substances it created.

IV. The City Should Also Be Required to Assess the Site as a Closed Landfill.

Without regard to the above analysis of the Spill Law, WDNR should also require the City to participate in investigating the Site pursuant to the Environmental Repair Program. As shown above, several individuals have documented solid waste disposal activities occurring at the Kreher Park site. The 1937 Sanitary Survey document confirms that the ravines, which formerly fingered their way from the mainland toward Lake Superior, were filled historically with a variety of municipal and industrial wastes. See Exhibit 20. The filling occurred at a non-approved facility in violation of state law.

WDNR has authority, pursuant to the Environmental Repair Statute, § 144.442, Stats., to require closure of all abandoned solid waste landfills. Such closure requirements, under § 144.442, Stats., and NR 500, Wis. Admin. Code, are obligations separate and apart from the application of Wisconsin's Hazardous Substance Spill Law. A release of contaminants impacting the environment has been documented at the Site. At least a portion of those contaminants is associated with solid waste disposal activities conducted by the

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[8] In U.S. EPA's 1994 Update of the study "Characterization of Municipal Solid Waste in the United States", metals make up, on average, 8.3% of municipal solid wastes. Metals typically include copper and zinc.

City and its residents. WDNR should pursue the City to obtain the appropriate assessment and closure of these previously abandoned landfill or municipal disposal sites from which SEH, NET and others have documented environmental impacts. The presence of heavy metals, fuel oil compounds, and other contaminants typically associated with solid waste disposal (and unrelated to coal tar contamination) at the Site, in the proximate area where longtime residents recall open dumping, support such a conclusion.

To the extent WDNR deems it appropriate to give the City the opportunity to refute allegations made by witnesses concerning its activities at the Site, then WDNR has the power to compel the production of evidence related to the Site pursuant to § 144.442(4)(b)2, and (d) Stats. Those provisions authorize WDNR to conduct investigations into the City's solid waste disposal activities at the Site by compelling the production of documents and the identification of individuals familiar with such activity. In fact, WDNR has a statutory obligation to follow up on the information provided herein and investigate the City's involvement in such activities (§ 144.442(4)(b)2, Stats.). That section provides:

> The Department may conduct an investigation, analysis and monitoring of a site or facility and areas surrounding the site or facility to determine the existence and extent of actual or potential environmental pollution from the site or facility, including, and not limited to, monitoring by means of installing test wells or by testing water supplies. The Department may conduct an investigation to identify persons who are potentially responsible for actual or potential environmental pollution from a site or facility. If the Department conducts an investigation to identify persons who are potentially responsible for actual or potential environmental pollution from a site or facility, the Department **shall** make a reasonable effort to identify as many persons as possible responsible for the environmental pollution.

(Emphasis added.)

V. Conclusion.

Based on the information provided herein, NSP requests WDNR issue an RP letter to the City of Ashland involving it in the assessment and remediation process at the Site. The City took action which resulted in discharges of hazardous substances to the environment. In addition, the City allowed and failed to restrict rampant solid waste disposal at the Site by its residents. The City should not have such actions and misfeasance rewarded by being granted a "pass" on this Site. At minimum, WDNR must, by law, follow up with a thorough investigation of these allegations to maximize the parties involved in this Site. Statute and equity demand it. Lastly, the evidence of unrestricted solid waste disposal at the Site, combined with the documented release of contaminants to the environment, demand that WDNR require the City to assess and properly close this abandoned landfill area.

Very truly yours,

MICHAEL, BEST & FRIEDRICH

Linda H. Bochert

David A. Crass

Attachments
cc: John D. Wilson, Esq.

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LIST OF EXHIBITS
to Letter to Deborah D. Johnson, October 18, 1995

TAB	DESCRIPTION
1	October 6, 1995 letter from Scott Clark of City of Ashland to John Wilson of Northern States Power Co. ("NSP").
2	Affidavit of Peter Carrington.
3	October 17, 1995 letter from David Trainor of Dames & Moore to James Musso of NSP regarding Potential for Natural Coal Tar Migration.
4	Wisconsin Department of Natural Resources ("WDNR") Spills List.
5	Wisconsin Board of Health Warnings to the City of Ashland.
6	Copy of 1951 Sanborn Map depicting open sewer.
7	1951 Greeley & Hansen drawing.
8	Affidavits of the following individuals recalling coal tar pit: Peter Carrington Joseph Kabasa, Jr. Mary Kabasa Gordon Parent Ken Veno John Walters Thomas Nelson Eugene Boyle
9	Affidavit of Fred Kovach.
10	Affidavit of Gordon Parent.
11	November 24, 1987 memo from David Jacobson of WDNR, to John LaFontaine of WDNR, along with memo to C.D. Besadny of WDNR, regarding recommendation to refer the City of Ashland to Department of Justice.
12	August 22, 1989 letter from John Dellaport of Northern Environmental Technologies to Nancy Atzen of WDNR reporting discovery of creosote contamination.
13	Interview Summary of LeRoy Lee.

14 August 21, 1991 letter from Jamie Dunn of WDNR, to Stephen Brand of City of Ashland.

15 June 21, 1991 letter from Gerald Novotny to Bonestroo, Rosene, Anderlik & Associates and Facilities Plan Amendment dated April 1991.

16 March 27, 1989 letter from Bonestroo, Rosene, Anderlik & Associates to City of Ashland regarding Facilitates Plan Amendment for Wastewater Treatment Works.

17 Minutes of the Ashland Park and Recreation Board Meeting held on June 24, 1974.

18 Affidavits of the following individuals recalling City disposal activities on the site:

Gordon Parent
Joseph Kabasa, Jr.
Ron Nye
Ken Veno
John Walters
Martin Eder (Interview Summary)

19 April 19, 1991 memo to WDNR file prepared by Karen Vermillion of WDNR.

20 "A Sanitary Survey of Ashland, Wisconsin," prepared by Wesley N. Warvi, University of Wisconsin Medical School.

21 § NR 51, Wis. Admin. Code.

22 1991 Report to the U.S. Senate's Committee on Environment and Public Works titled Water Pollution -- Nonindustrial Wastewater Pollution Can be Better Managed, GAO/RCED-92-40.

23 October 17, 1995 letter from Dames & Moore regarding SEH Temporary Well TW-6.

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